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TORT LIABILITY FOR SERVING ALCOHOL: AN EXPANDING DOCTRINE

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I. INTRODUCTION

At common law there was no liability on the part of one selling or furnishing liquor to "an able bodied person."[1] Increasing awareness of the havoc wrought by intoxicated persons, particularly on the highways, has led to a gradual erosion of the common law position. Since the advent of the modern highway system, courts have been increasingly willing to find liability on the part of commercial vendors.[2] A few jurisdictions have moved beyond vendor liability and have extended liability to social hosts. In almost every instance, these attempts have been limited by subsequent legislation.

This comment examines the current state of this essentially judicially created cause of action. It concludes that the time has come for Montana to reexamine its common law position on tort liability for social hosts and vendors and recognize a limited cause of action.

II. DEVELOPMENT OF A CAUSE OF ACTION

A. *Common Law Recognized No Cause of Action*

Before the invention of the automobile, the one most likely to suffer injury from an intoxicated person was the drinker herself. The common law acknowledged this fact. Selling or giving intoxicating liquor to a "strong and able-bodied" person was not negligence and did not impose liability on the provider.[3] Claims against the provider were usually rejected unless the intoxicated person was "an infant of tender years, or an idiot, or a person *non compos mentis*, from any cause."[4] This attitude was carried forward into modern law with courts frequently noting that the act of drinking rather than providing liquor causes intoxication.[5]

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1. Cruse v. Aden, 127 Ill. 231, 234, 20 N.E. 73, 74 (1889).

2. Note, *Common Law Liability of Liquor Vendors*, 31 MONT. L. REV. 241 (1970). The author of the note discusses this trend and many of the early cases imposing liability on vendors.

3. *Cruse*, 127 Ill. at 234, 20 N.E. at 74.

4. McCue v. Klein, 60 Tex. 168, 169 (1883). In *McCue*, the court held that the plaintiff had a cause of action against defendants who had induced her husband, "an habitual drunkard," to drink three pints of liquor. *Id.* The husband subsequently died and the court found that, although the husband had agreed to partake, he was not in any condition to resist by the time he drank the third pint. *Id.* at 170.

5. Note, *supra* note 2, at 242-43. *See also* Nevin v. Carlasco, 139 Mont. 512, 516, 365

B. *Liability Has Been Extended to Vendors*

1. *Dramshop Acts*

Although a few courts allowed recovery from a vendor on the theory that the seller's acts were particulary egregious,[6] it was not until the passage of Dramshop or Civil Damages Acts that liability was imposed on any wide basis. These laws were passed in the latter part of the nineteenth century as a result of the Prohibition Movement.[7] Thirty-eight states have had dramshop acts at some point in their history.[8] Currently eighteen states have such laws in effect and interestingly, three of those have been passed within the last few years.[9]

Dramshop acts impose civil liability on sellers of liquor if the plaintiff has established that she has met the requirements of the statute.[10] These acts, however, may limit the amount of recovery[11] and frequently allow a cause of action only to certain defined parties.[12] When a dramshop act is in place, some courts have held that the act is the exclusive remedy against a vendor and have refused to allow recovery on any other theory.[13] Conversely, other courts have allowed common law negligence actions once it has been established that the dramshop act does not apply in the particular circumstances.[14] Montana has never had a dramshop act.[15]

2. *Common Law Negligence*

A number of jurisdictions have permitted actions against commercial vendors using a negligence analysis. In any negligence case, the plaintiff must establish certain elements: (1) that the defendant owed a duty recognized in law to the plaintiff, (2) that she breached the duty, (3) that the breach was the cause of the plain-

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P.2d 637, 639 (1961); Cole v. Rush, 45 Cal. 2d 345, 356, 289 P.2d 450, 457 (1955).

6. Ewing v. Cloverleaf Bowl, 20 Cal. 3d 389, 572 P.2d 1155, 143 Cal. Rptr. 13 (1978). *See* text accompanying notes 118-22, *infra*.

7. Note, *Social Host Liability for Injuries Caused by the Acts of an Intoxicated Guest*, 59 N.D.L. REV. 445, 448-49 (1983).

8. Comment, *Third Party Liability for Drunken Driving: When "One for the Road" Becomes One for the Courts*, 29 VILL. L. REV. 1119, 1124 (1984).

9. *Id.* at 1125.

10. Note, *supra* note 7, at 451.

11. *Id.* at 450.

12. Comment, *supra* note 8, at 1127.

13. Stanner, *Liability of Social Host for Off Premises Negligence of Inebriated Guest*, 68 ILL. B.J. 396, 399 (1980).

14. Waynick v. Chicago's Last Dep't Store, 269 F.2d 322 (7th Cir. 1959); Holmquist v. Miller, 352 N.W.2d 47 (Minn. App. 1984); Blamey v. Brown, 270 N.W.2d 884 (Minn. 1978).

15. Comment, *supra* note 8, at 1124 n.23.

tiff's injury, and (4) that the plaintiff was damaged.[16] The defendant's duty has been found in state statutes or in traditional common law.

A statute may be used to define the duty owed by a provider of alcohol to others.[17] All fifty states have adopted some sort of liquor control act. These acts usually impose a criminal penalty on one who furnishes liquor to a minor or to an intoxicated person.[18] To use liquor control statutes to define a vendor's duty, courts have had to overcome two obstacles.

First, the plaintiff must show that she was a member of the class of persons which the statute was intended to protect and that the statute was intended to guard against the kind of harm she had suffered.[19] Twenty-four jurisdictions have found that their liquor control statutes were enacted to protect the general public.[20] Others have refused to construe their liquor control acts this way.[21] Second, the statute in question must apply to the particular provider. Many of the control acts apply to "any person"[22] or "every person"[23] and could be construed quite broadly. If the act is found to apply, a violation will generally be held to be either negligence per se or evidence of negligence.

The seminal case allowing recovery from a vendor under an ordinary negligence theory was *Rappaport v. Nichols.*[24] *Rappaport* involved service of liquor to a minor who was later involved in an accident. The New Jersey Supreme Court reasoned that although the state had repealed its Civil Damage Act in 1934, "[t]he repealer left unimpaired the fundamental negligence principles which admittedly prevail in New Jersey."[25] The court determined that the legislature had intended to protect the general public by prohibiting sales of liquor to minors and intoxicated persons. Thus, the seller could be liable for injuries caused by a customer when

16. Alegria v. Payonk, 101 Idaho 617, 619, 619 P.2d 135, 137 (1980).

17. W. PROSSER & W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 36, at 220 (5th ed. 1984).

18. Comment, *supra* note 8, at 1137.

19. W. PROSSER & W. KEETON, *supra* note 17, at 224-25.

20. Note, *Injuries Arising from Negligence in Furnishing Liquor to Minors and Intoxicated Adults: New Tort Action in Wyoming. McClellan v. Tottenhoff, 666 P.2d 408 (Wyo. 1983)*, 19 LAND AND WATER L. REV. 285, 290 n.51 (1984).

21. *See, e.g.*, Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity, 258 Or. 632, 638, 485 P.2d 18, 21 (1971).

22. MONT. CODE ANN. § 16-3-301(2) (1983). *See also* Longstreth v. Fitzgibbon, 125 Mich. App. 261, 263, 335 N.W.2d 677, 679 (1983).

23. CAL. BUS. & PROF. CODE § 25602(a) (West Supp. 1985).

24. 31 N.J. 188, 156 A.2d 1 (1959).

25. *Id.* at 201, 156 A.2d at 8.

the seller "knows or should know that the patron is a minor or intoxicated."[26] The vendor argued that his conduct was not the proximate cause of the injury, but the court said that a jury could reasonably find such a causal relationship.[27]

Since *Rappaport* a majority of jurisdictions addressing the issue have recognized a statutory duty on the part of vendors and have imposed liability.[28] Montana is not among these, however. Some courts have ignored the statutes altogether and have found the seller's duty to be based in the general common law duty each person has to avoid creating an unreasonable risk of harm to others.[29] This duty can flow to a patron or to a third person injured by an intoxicated customer.

C. *Liability Has Been Found on the Part of a Social Host*

1. *Generally*

Once the common law doctrine had been abrogated in the case of the liquor vendor, courts in a number of jurisdictions attempted to extend liability to non-commercial providers of alcohol. The same bases—dramshop acts, liquor control statutes, and common law negligence—were used to find liability, although not as successfully. In almost every case where a cause of action was recognized, the intoxicated person was a minor. Legislative bodies in most jurisdictions responded by limiting the judicial doctrine in some fashion. An examination of the case law is illustrative.

2. *Liability Based on Dramshop Acts*

The language in some dramshop acts is quite broad, imposing civil liability on "any person" who sells or gives liquor to another.[30] This broad language appears to apply to the social host, but in reality has been generally construed to apply only to those in the business of selling liquor.[31] Two courts, however, have allowed a cause of action against a non-seller based on a dramshop act.

The Iowa Supreme Court, in *Williams v. Klemsrud*,[32] refused

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26. *Id.* at 202, 156 A.2d at 9.

27. *Id.* at 203, 156 A.2d at 9.

28. Slicer v. Quigley, 180 Conn. 252, 269-71, 429 A.2d 855, 863 (1980). *See also* Nazareno v. Urie, 638 P.2d 671, 674 n.3 (Alaska 1981).

29. Jardine v. Upper Darby Lodge No. 1973, Inc., 413 Pa. 626, 198 A.2d 550 (1964). *See also Nazareno*, 638 P.2d at 674 n.5.

30. Comment, *supra* note 8, at 1126.

31. Graham, *Liability of the Social Host for Injuries Caused by the Negligent Acts of Intoxicated Guests*, 16 WILLAMETTE L. REV. 561, 565 (1980).

32. 197 N.W.2d 614 (Iowa 1972).

to restrict that state's dramshop act to vendors. It held that the twenty-one year old defendant was liable for injuries caused when he purchased liquor for his twenty year old friend who was subsequently involved in an automobile accident.[33] The court further held that contributory negligence was not a bar to plaintiff's action because the dramshop act created a strict "statutory right . . . not necessarily based upon fault or negligence."[34] Thus, under *Klemsrud*, the defendant could not show that the injury was caused by a combination of both plaintiff's and defendant's negligence.

Shortly after the *Klemsrud* decision, the Minnesota Supreme Court addressed a similar claim in *Ross v. Ross*.[35] Defendant in that case purchased liquor for his nineteen year old brother. The brother became intoxicated and died when he drove his car off the road.[36] The Minnesota court reviewed the history of the state's dramshop act and concluded that the legislature intended it to apply to all those who might violate the liquor laws.[37] Because Minnesota considered its statute to be both remedial and penal, the court adopted a liberal construction.[38]

The legislatures of both Minnesota and Iowa responded by amending their dramshop acts so that only those who are in the business of selling liquor are liable under those acts.[39] The courts of both states, however, have continued to find remedies for third parties injured by an intoxicated person. The Iowa act no longer applies to sales to minors, but the court has held that where the act does not apply, a common law negligence action may be brought.[40] Similarly, the Minnesota court allowed a common law negligence action to be brought against a social host, reasoning that such an action is appropriate since the amended dramshop act

33. *Id.* at 615.

34. *Id.* at 617.

35. 294 Minn. 115, 200 N.W.2d 149 (1972).

36. *Id.* at 116, 200 N.W.2d at 150.

37. *Id.* at 117, 200 N.W.2d at 150-51.

38. *Id.* at 120, 200 N.W.2d at 152. *But see* Miller v. Owens-Illinois Glass Co., 48 Ill. App. 2d 412, 422, 199 N.E.2d 300 (1964). The court in *Miller* declined to construe Illinois' Dramshop Act liberally because it was penal in nature.

39. IOWA CODE ANN. § 123.92 (West Supp. 1985); MINN. STAT. ANN. § 340.95 (West Supp. 1985).

40. Haafke v. Mitchell, 347 N.W.2d 381 (Iowa 1984). *See also* Clark v. Mincks, 364 N.W.2d 226 (Iowa 1985). In *Clark* the Iowa Supreme Court, over a powerful dissent, found that common law negligence liability could be extended to a host who provided liquor to an adult guest. Relying on *Haafke*, the court held that a criminal statute prohibiting the giving of liquor to "any intoxicated person" did not exclude the social host. *Id.* at 231. The dissent unsuccessfully argued that the Iowa General Assembly had intended to restrict liability to licensed sellers when it amended that state's dramshop act. *Id.* at 233.

does not apply to social hosts.[41]

3. *Ordinary Negligence*

Courts in Michigan,[42] Indiana,[43] and Pennsylvania[44] were among the first to find that liquor control statutes could be a basis for civil liability of social hosts as well as vendors. Since the statutes were not worded in such a way that they only applied to vendors, these courts looked beyond the statutes to determine whether they were intended to apply to anyone who provided liquor to others.

Because the Pennsylvania legislature intended to protect "innocent third parties" when it enacted its liquor control statute, a federal district court in that state held that the statute could support civil liability for a social host.[45] The Pennsylvania Supreme Court, however, declined to adopt the view of the federal court. Only four months after the federal court decision, the supreme court held that only *licensed* sellers could be held civilly liable under the liquor code.[46]

The Michigan Court of Appeals held that the purpose of that state's liquor control statute was to protect the public from injuries that might be caused by intoxicated minors.[47] A proven violation of the statute would be negligence per se.[48] Construing the phrase "any person" to include a social host, the Indiana Court of Appeals also held that violation of a statute prohibiting furnishing of alcohol to minors was negligence.[49] Relying on an earlier decision which held that violation of the statute by a vendor created liability, the Indiana court could find "no distinction between one who sells alcoholic beverages to a minor and one who gives alcoholic beverages to a minor."[50]

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41. Holmquist v. Miller, 352 N.W.2d 47 (Minn. App. 1984).
42. Thaut v. Finley, 50 Mich. App. 611, 213 N.W.2d 820 (1974).
43. Brattain v. Herron, 159 Ind. App. 663, 309 N.E.2d 150 (1974).
44. Giardina v. Solomon, 360 F. Supp. 262 (M.D. Pa. 1973).
45. *Id.* at 263.
46. Manning v. Andy, 454 Pa. 237, 310 A.2d 75 (1973).
47. *Thaut*, 50 Mich. App. at 613, 213 N.W.2d at 822.
48. *Id.*
49. *Brattain*, 159 Ind. App. at 674, 309 N.E.2d at 156. The Indiana court recently held that civil liability could be extended to "family, friend, or acquaintance" who furnishes alcohol to an intoxicated person. Ashlock v. Norris, ___ Ind. App. ___, 475 N.E.2d 1167, 1169 (1985). In *Ashlock*, the defendant purchased drinks for an adult friend who subsequently hit and killed a pedestrian. The court relied on a statute prohibiting the giving of alcohol to an intoxicated person in reaching its conclusion that the plaintiff did have a claim against the defendant.
50. *Brattain*, 159 Ind. App. at 674, 309 N.E.2d at 156.

It should be noted that most decisions favoring liability for social hosts under liquor control statutes have addressed situations where an adult provided liquor to a minor. A Minnesota court recently expressed the policy inherent in the extension of liability to social hosts who serve liquor to minors:

> Social policy dictates that individuals who procure intoxicating liquor for minors be held liable for damages caused by the minor. The social ills from intoxication are grossly aggravated when minors are involved because of their documented inability to cope properly with intoxicating liquor. Imposing civil liability discourages the illegal furnishing of liquor to minors; thus, it serves to promote our strong public policy of preventing our youth from causing senseless damage to themselves and the public.[51]

Courts have been very reluctant to hold a social host liable for injuries caused by an intoxicated adult. The Michigan court has limited its holding to social hosts who knowingly supply liquor to minors.[52] The Pennsylvania Supreme Court has specifically stated that "there can be no liability on the part of a social host who serves alcoholic beverages to his or her adult guests."[53] One court did extend liability to a social host for furnishing liquor to an adult guest using liquor control statutes, but was quickly overruled by legislative action. Relying on previous holdings,[54] the California Supreme Court, in *Coulter v. Superior Court*,[55] found an apart-

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51. *Holmquist*, 352 N.W.2d at 52. The action in *Holmquist* was brought by the parents of a minor girl who had been served liquor at the home of the Millers. Ms. Holmquist left the party in an auto driven by another minor who had been served liquor. She fell from the car, sustaining fatal injuries. *Id.* at 49.

The Minnesota Court of Appeals held that, although the state's dramshop act applied only to vendors, a social host could be liable under a common law negligence theory for violating Minnesota's liquor control act. *Id.* at 52.

52. Longstreth v. Fitzgibbon, 125 Mich. App. 261, 266, 335 N.W.2d 677, 680.

53. Klein v. Raysinger, 470 A.2d 507, 511 (Pa. 1983). *See also* Sites v. Cloonan, 477 A.2d 547 (Pa. Super. 1984).

The Pennsylvania court did use a statute to find liability on the part of a host who served his minor employee liquor at the company's Christmas party. Congini v. Portersville Valve Co., 470 A.2d 515 (Pa. 1983). Rather than a liquor control act, the court in *Congini* noted that the Crimes Code made it a crime for a minor to consume liquor. *Id.* at 517. Therefore an adult who furnishes liquor to a minor is an accomplice and negligent per se. *Id.* at 518. Under this analysis the social host "may assert as a defense the minor's 'contributory' negligence." *Id.*

54. In 1971, the California Supreme Court found a vendor civilly liable for injuries to a third party caused by a minor to whom the vendor had sold liquor in violation of the state's liquor control statute. Vesely v. Sager, 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971). The following year the California Court of Appeal reversed earlier rulings and held an employer to be liable for injuries caused by a minor who became intoxicated at the company Christmas party. Brockett v. Kitchen Boyd Motor Co., 24 Cal. App. 3d 87, 100 Cal. Rptr. 752 (1972).

55. 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978).

ment manager civilly liable for injuries caused by an intoxicated adult guest. *Coulter* arose out of an automobile accident. The plaintiff was injured when the car in which he was riding struck an abutment. The driver had been served a large quantity of alcohol in the recreation room of the defendant's apartment complex.[56]

To determine if the California Alcoholic Beverage Control Act could support social host liability, the California Supreme Court looked to legislative intent. The Legislature had indicated that the purpose of the Act was "protection of the safety, welfare, health, peace and morals of the people of the State."[57] The Act further applied to "every person" who provided alcohol to an obviously intoxicated person.[58] The court thus held that "every person" included social hosts as well as vendors.[59] After reviewing the statutory basis for liability, the court discussed principles of negligence. It found its extension of liability to be in harmony with modern negligence law:

> Furthermore, well established general negligence principles lead us to conclude, independently of statute, that a social host or other non-commercial provider of alcoholic beverages owes to the general public a duty to refuse to furnish such beverages to an obviously intoxicated person if, under the circumstances, such person thereby constitutes a reasonably foreseeable danger or risk of injury to third persons.[60]

The court in *Coulter*, however, misread legislative intent. Shortly after the *Coulter* decision, the liquor control statutes were amended to preclude any liability except on the part of a licensee who furnishes liquor to "any obviously intoxicated minor where the furnishing . . . is the proximate cause" of injury or death to a third person.[61]

Some courts have refused to find that liquor control acts im-

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56. *Id.* at 148, 577 P.2d at 671, 145 Cal. Rptr. at 536.

57. *Id.* at 151, 577 P.2d at 673, 145 Cal. Rptr. at 538. *See also* CAL. BUS. & PROF. CODE § 23001 (West 1985).

58. *Id.* at 150, 577 P.2d at 672, 145 Cal. Rptr. at 537.

59. *Id.*

60. *Id.* at 149-50, 577 P.2d at 672, 145 Cal. Rptr. at 537.

61. CAL. BUS. & PROF. CODE § 25602.1 (West Supp. 1985). The amended statute states in part:

> The Legislature hereby declares that this section shall be interpreted so that the holdings in cases such as Vesely v. Sager (5 Cal. 3d 153), Bernhard v. Harrah's Club (16 Cal. 3d 313) and Coulter v. Superior Court (____ Cal. 3d ____) be abrogated in favor of prior judicial interpretation finding the consumption of alcoholic beverages rather than the serving of alcoholic beverages as the proximate cause of injuries inflicted upon another by an intoxicated person.

CAL. BUS. & PROF. CODE § 25602(c) (West Supp. 1985).

pose a duty on the social host, yet have recognized a cause of action based on the duty one person owes to another. For example, the Oregon Supreme Court, in *Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity*,[62] found that liquor control statutes are to be narrowly applied, but held a social host liable based on "considerations of policy which lead the law to say that the particular plaintiff is entitled to protection."[63]

In *Wiener*, the plaintiff was injured when the automobile in which she was a passenger ran into a building. The minor driver was returning from a fraternity party at which he had been served alcoholic beverages. The plaintiff sued the owner of the property where the party had been held, the purchaser of the alcohol, and the fraternity.[64] The Oregon court rejected the plaintiff's contention that the property owner and the purchaser had violated Oregon's beverage control statutes, holding that those statutes were not intended to protect injured third persons.[65] But the court found that "there may be circumstances under which a person could be held liable for allowing another to become dangerously intoxicated."[66] Because the property owner and the purchaser had no control over the "direct dispensation" of the alcohol, the court found no duty on their part to protect the plaintiff.[67]

The court did find a duty on the part of the fraternity, however, "to refuse to serve alcohol to a guest when it would be unreasonable under the circumstances to permit him to drink."[68] The court declined to articulate an absolute rule, indicating that each case would "be decided on its own facts."[69] In finding that a jury could conclude the fraternity was negligent, the court noted that (1) the driver was a minor, (2) the fraternity was directly involved in serving liquor to him, and (3) the fraternity ought to have known that he would be driving since he drove to the site which was some distance from his home.[70]

The Oregon Legislature responded to *Wiener* by narrowing the court's flexible test and imposing liability only in certain defined situations. Under the current legislation neither a vendor nor a social host is liable unless the liquor is served to one who is "visi-

62. 258 Or. 632, 485 P.2d 18 (1971).
63. *Id.* at 640, 485 P.2d at 22 (quoting PROSSER, THE LAW OF TORTS 333 (3d ed. 1964)).
64. *Id.* at 637-38, 485 P.2d at 20.
65. *Id.* at 638, 485 P.2d at 21.
66. *Id.* at 640, 485 P.2d at 22.
67. *Id.*
68. *Id.* at 643, 485 P.2d at 23.
69. *Id.* at 639, 485 P.2d at 21.
70. *Id.* at 643, 485 P.2d at 23.

bly intoxicated."[71] In the case of a third party injured by an intoxicated minor, liability will only be found if under the circumstances a "reasonable person" would have requested identification or if altered or inadequate identification was used by the minor.[72] Thus *Wiener* is probably still good law in Oregon, but will be limited by the statutes in future cases.

One of the few courts which has held a social host liable for injuries caused by an intoxicated adult did so using a conventional negligence analysis. The New Jersey Supreme Court recently held, in *Kelly v. Gwinnell*,[73] that a provider of alcohol "has a duty to the public not to create foreseeable, unreasonable risks by this activity."[74]

Plaintiff Kelly was injured when her auto was struck by that of Gwinnell. Gwinnell had been served alcohol at the home of the Zaks. Although he testified that he had only had a few drinks, the court found that he had probably had as many as thirteen shots of Scotch.[75] Kelly sued both Gwinnell and the Zaks. Liability in *Kelly* was premised on two major factors, foreseeability and fairness. The duty of the provider only arises when the host is in a "position to foresee quite clearly" that if she continues to provide alcohol to her guest, that guest is likely to injure someone.[76] The court relied on the fact that defendant Gwinnell's blood alcohol after the accident was 0.286%. An expert testified that he must have been "showing unmistakable signs of intoxication" while still at the Zaks' home.[77]

Once a duty was found, the court looked at the state's policy to determine if it was fair to impose liability on a social host. New Jersey has made a particularly strong commitment to reduction of drunk driving.[78] While expressing a concern that the decision could interfere with social behavior, the court nevertheless said that the deterrent effect of its ruling would result in a gain to society.[79] The holding in *Kelly*, however, was carefully limited to situations "where the host directly serves the guest and continues to do so even after the guest is visibly intoxicated, knowing that the guest

71. Or. Rev. Stat. §§ 30.950, 30.955 (1983).
72. Or. Rev. Stat. § 30.960 (1983).
73. 96 N.J. 538, 476 A.2d 1219 (1984).
74. *Id.* at 548, 476 A.2d at 1224.
75. *Id.* at 541, 476 A.2d at 1220.
76. *Id.* at 544, 476 A.2d at 1222.
77. *Id.* at 541, 476 A.2d at 1220.
78. *Id.* at 545, 476 A.2d at 1222.
79. *Id.* at 548, 476 A.2d at 1224.

will soon be driving home."[80]

Like *Coulter*, *Kelly* was a fairly predictable extension of prior case law. In previous holdings New Jersey courts have imposed liability on a vendor whose minor patron had injured a third party,[81] a vendor when an intoxicated adult customer fatally injured himself,[82] and a social host for injuries caused by a minor guest.[83] In 1972 a New Jersey Superior Court extended liability to a social host for injuries caused by an adult guest.[84] Thus *Kelly* cannot be viewed as a radical departure from existing law, but rather as a logical progression of the law in a single jurisdiction.

4. *Effect of the Guest's Voluntary Ingestion of Alcohol*

When the injured party is the guest herself, the host can raise the issue of the guest's contributory or comparative negligence. The host's liability is diminished as that of the guest increases.[85] When the suit is brought by a third party, it is likely that both the drinker and the provider would have to share any liability imposed. The New Jersey court in *Kelly* adopted this approach, holding "that the host and guest are liable to the third party as joint tortfeasors."[86]

III. A Cause of Action in Montana

A. *Current Case Law Is Confusing*

1. *Vendor Liability*

Montana follows the general rule that if a statute is enacted to protect the public, violation of the statute is negligence per se.[87] The Montana Supreme Court has never clearly defined the liquor control statutes to be so enacted, however. The supreme court has indicated that a violation of these statutes *might* be negligence per se,[88] but the court has never imposed liability on a liquor vendor

80. *Id.* at 556, 476 A.2d at 1228.

81. *Rappaport*, 31 N.J. 188, 156 A.2d 1.

82. Soronen v. Olde Milford Inn, Inc., 46 N.J. 582, 218 A.2d 630 (1966).

83. Linn v. Rand, 140 N.J. Super. 212, 356 A.2d 15 (1976).

84. Figuly v. Knoll, 185 N.J. Super. 477, 449 A.2d 564 (1982).

85. Comment, *Social Host Liability for Furnishing Liquor—Finding a Basis for Recovery in Kentucky*, 3 N. Ky. L. Rev. 229, 245 (1976).

86. *Kelly*, 96 N.J. at 559, 476 A.2d at 1230. The court remanded the case. Mrs. Kelly went to trial but during the proceedings the defendants' insurer settled for $172,500. She will get $100,000 from Gwinnell and the remainder from the Zaks. *See Expensive Pour*, Time Magazine, Mar. 4, 1985 at 73.

87. Azure v. City of Billings, 182 Mont. 234, 240, 596 P.2d 460, 464 (1979).

88. Swartzenberger v. Billings Labor Temple, 179 Mont. 145, 150, 586 P.2d 712, 715 (1978).

under any theory.

Montana federal district courts, however, have twice held that a vendor was liable for injuries to third parties caused by intoxicated patrons.[89] In *Deeds v. United States*,[90] a federal district court imposed liability on an Air Force N.C.O. club where an intoxicated minor had been served liquor. The minor serviceman was subsequently involved in an automobile accident in which the plaintiff, a seventeen year old girl, was injured. Although the court in *Deeds* discussed the violation of the liquor control statute,[91] the court looked beyond the statute to define the vendor's duty. Judge William Jameson noted that there was no clear Montana law, but determined that the Montana rules of proximate cause and foreseeability supported a finding of liability.[92] In his opinion, Judge Jameson relied on the fact that the vendors violated Montana law in furnishing liquor to the minor serviceman, knowing he "was a minor and obviously or apparently intoxicated."[93] Additionally, the defendant's agents knew that the only way for the young people to return home from the air base was by private automobile.[94]

Deeds was followed in 1980 by *Johnson v. United States*.[95] In that case, Judge Paul Hatfield found that violations of state statutes and Air Force regulations which prohibited vendors from serving alcohol after closing hours were negligence per se and a proximate cause of the plaintiff's injuries.[96] The court in *Johnson* did not mention any Montana Supreme Court decisions in reaching its holding.

In the years between the decisions in *Deeds* and *Johnson*,

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89. Johnson v. United States, 496 F. Supp. 597 (1980) (bifurcated on the issue of damages, *see* 510 F. Supp. 1039 (1981)); Deeds v. United States, 306 F. Supp. 348 (1969).

90. 306 F. Supp. 348 (1969). This case is discussed in 31 MONT. L. REV. 214. Note, *supra* note 2.

91. *Id.* at 359.

92. *Id.* at 361.

93. *Id.* at 359.

94. *Id.* at 363.

95. 496 F. Supp. 597.

96. *Id.* at 603-04. The plaintiff, Johnson, was a member of the United States Air Force. In addition to his regular duties, he was employed part time at the N.C.O. Club at Malmstrom Air Force Base. He and other employees, with the knowledge of the Club's manager and in direct violation of both Montana law and Air Force regulations, consumed liquor at an "after hours" party on the Club premises. Johnson was severely injured in an auto accident while being driven home from the Club by another party-goer, Hay. Hay was found to be under the influence of alcohol at the time of the accident. *Id.* at 601.

Ignoring existing Montana case law, the court looked to *Deeds* and found that the violations of "closing hours" statutes and regulations were one of the proximate causes of Johnson's injuries. Although Hay's intoxication was "a 40% causative factor," it "was a foreseeable intervening cause and therefore [did] not cut off [defendant United States'] liability to the plaintiff." *Id.* at 604.

however, the Montana court addressed the issue of vendor liability twice. In *Folda v. City of Bozeman*,[97] the court refused to hold a bar liable for the death of a minor patron and in *Swartzenberger v. Billings Labor Temple*,[98] the court found no negligence on the part of a bartender who served an obviously intoxicated adult, who subsequently was killed. The court in *Swartzenberger* distinguished *Deeds* on the grounds that the *Swartzenberger* claim was not brought by a third party and involved no special knowledge on the part of the bartender.[99]

2. *The Social Host*

Montana's liquor control statutes prohibit furnishing of alcoholic beverages to those under nineteen years of age[100] and persons "apparently under the influence of alcohol."[101] In spite of the broad language in these statutes, the Montana Supreme Court, as noted above, has never allowed imposition of civil liability under them. In *Runge v. Watts*,[102] the court refused to find a social host civilly liable under either the liquor control statute or a criminal statute prohibiting unlawful transactions with children.[103]

Unlike *Folda* and *Swartzenberger*, the action in *Runge* was brought by a third party who was injured when the car in which he was riding struck a utility pole. Both the minor driver and his passenger had left a party at the home of one defendant where they had been served beer. The court in *Runge* indicated that it would not impose liability on a social host when the Legislature had yet to extend liability to vendors through dramshop legislation.[104] Although it did not refuse to construe the statutes in such a way that they could support liability, the court said, "Establishing such a civil cause of action involves considerations of public policy far beyond those presented by the circumstances of the instant case."[105] Under present Montana law, the driver's "drinking and not defendant's serving the beer was the proximate cause of the accident which resulted in plaintiff's injury."[106]

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97. 177 Mont. 537, 582 P.2d 767 (1978).
98. 179 Mont. 145, 586 P.2d 712 (1978).
99. *Swartzenberger*, 179 Mont. at 151, 586 P.2d at 715.
100. MONT. CODE ANN. § 16-3-301 (1983).
101. MONT. CODE ANN. § 16-6-304 (1983).
102. 180 Mont. 91, 589 P.2d 145 (1979).
103. MONT. CODE ANN. § 45-5-623 (1983).
104. *Runge*, 180 Mont. at 94, 589 P.2d at 147.
105. *Id.*
106. *Id.*

3. *The Negligence of the Drinker*

The Montana court has apparently adopted the old common law position that it is the drinking of liquor, not the serving of it, which constitutes negligence. The court, however, by refusing to reject *Deeds* outright, has not completely barred a cause of action. In refusing to find liability, the court has relied on two theories—contributory negligence and proximate cause.

In *Folda*, a seventeen year old customer drowned in a creek outside of a Bozeman bar where she had been served liquor. She was highly intoxicated and her father sued the bar, claiming that service to a minor was negligence.[107] The court held that her voluntary intoxication was contributory negligence and barred recovery.[108]

An adult patron of a Billings vendor was served alcohol in spite of his obvious intoxication in *Swartzenberger*.[109] Upon leaving the bar, the customer fell down the stairs and sustained fatal injuries. His ex-wife brought an action against the bar alleging violation of a Montana statute. Since it was not "apparent, or reasonably should have been apparent," to those who served him that the patron's drinking would result in a fatal fall, the customer's contributory negligence barred any recovery.[110] The court noted that the decedent had also violated a statute prohibiting public drunkeness. This violation coupled with his voluntary intoxication was contributory negligence and barred recovery.

Since the decisions in *Folda* and *Swartzenberger*, Montana has replaced contributory negligence with the doctrine of comparative negligence.[111] Under this scheme, negligence on the part of the drinker would not bar recovery, unless it were greater than the negligence of the defendant.[112] It would appear, then, that if a plaintiff could present a prima facie case of negligence on the part of a provider of liquor, she would have a cause of action under the new comparative negligence scheme.

The Montana court may have closed this door in *Runge*. That case involved an action brought by a third party against a social host who served liquor to a minor. Although the Montana court has never addressed the issue of a host's duty to the guest herself, the court clearly has said that an injured third party is not barred

107. *Folda*, 177 Mont. at 545, 582 P.2d at 772.
108. *Id.* at 546, 582 P.2d at 772.
109. *Swartzenberger*, 179 Mont. at 146, 586 P.2d at 713.
110. *Id.* at 151, 586 P.2d at 715.
111. MONT. CODE ANN. §§ 27-1-701, -702 (1983).
112. Derenberger v. Lutey, ___ Mont. ___, 674 P.2d 485, 487 (1983).

by the contributory negligence of the drinker.[113] In *Runge*, the court refused to hold that Montana's liquor control statute, by itself, created a cause of action.[114] Refusing to follow *Deeds*, the court found the general rule to be "there can be no cause of action against one furnishing liquor in favor of those injured by the intoxication of the person to whom it has been . . . furnished" unless the person was deprived of "his willpower or responsibility for his behavior."[115] But the court went on to say:

> Traditionally, there has been greater justification for imposing liability on a commercial purveyor than on a social purveyor. There is a greater need for some check on the pecuniary motives of those engaged in the business of selling alcoholic beverages. In addition a commercial vendor is in a better position to observe his customers and monitor their level of intoxication by virtue of the fact that the seller is more likely to communicate with the patron each time he serves a new drink.
>
> Taking this into consideration, we are reluctant to extend the liability of persons serving alcoholic beverages to a social setting when the legislature has to date failed to extend that liability to commercial vendors by virtue of dramshop legislation.[116]

The court went on to hold that the minor's drinking, not the defendant's serving of the alcohol, was the proximate cause of the plaintiff's injury.[117]

4. *The Provider's Willful Misconduct*

It does appear that a plaintiff may be able to recover if she can show willful misconduct on the part of the provider. The court in *Swartzenberger* could find no willful misconduct on the part of the vendor, but cited a California case, *Ewing v. Cloverleaf Bowl*,[118] for the proposition that contributory negligence was not a bar to recovery if the defendant's conduct could be characterized as willful misconduct.[119]

The actions of the vendor in *Ewing* were particularly egregious. An experienced bartender served a patron at least ten shots

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113. *Runge*, 180 Mont. at 92, 589 P.2d at 146. In Johnson v. United States, 496 F. Supp. 597, the defendant successfully raised a defense of assumption of the risk. The federal court found that the plaintiff was 25% negligent in assuming the risk of riding with an intoxicated driver. This finding served to reduce the plaintiff's recovery by 25%. *Id.* at 604.

114. *Runge*, 180 Mont. at 93, 589 P.2d at 147.

115. *Id.* at 93, 589 P.2d at 146-47 (quoting 45 AM. JUR. 2D, *Intoxicating Liquors* § 554).

116. *Id.* at 94, 589 P.2d at 147.

117. *Id.*

118. 20 Cal. 3d 389, 572 P.2d 1155, 143 Cal. Rptr. 13 (1978).

119. *Swartzenberger*, 179 Mont. at 149, 586 P.2d at 715.

of straight rum in a period of an hour and a half.[120] The patron had informed the bartender that it was his twenty-first birthday. It soon became obvious to all that the young customer was getting drunk, yet the bartender continued to serve him in contravention of the bar's posted policy.[121] After returning home, the young man died of acute alcohol poisoning. His blood alcohol level was determined to be 0.47%. The California court said that the bartender's acts suggested "not merely a want of ordinary care, but willful misconduct."[122]

The Montana court, in another context, has said that "negligence is separate and distinct from willful or wanton misconduct."[123] Thus, a plaintiff's negligence cannot be compared with a defendant's willful misconduct under Montana's comparative negligence statute and will not bar recovery.[124] Additionally, such misconduct can serve as a basis for exemplary damages.[125]

B. *Legislative Guidance Is Lacking*

The court has indicated a need for legislative guidance in addressing the difficult questions raised when alcohol is provided to minors and intoxicated persons.[126] Such guidance has not been forthcoming. An "anti-dramshop" act was introduced in the Forty-ninth Legislature. The bill as originally proposed would have exempted any "person or entity" who provided alcohol to anyone under any circumstances from civil liability "for injury or damage of any kind wholly or partly caused by the consumer's being under the influence of alcoholic beverages."[127] The House of Representa-

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120. *Ewing*, 20 Cal. 3d at 394, 572 P.2d at 1158, 143 Cal. Rptr. at 15.
121. *Id.* at 403, 572 P.2d at 1158, 143 Cal. Rptr. at 20.
122. *Id.* at 403, 572 P.2d at 1162, 143 Cal. Rptr. at 20.
123. *Derenberger*, ___ Mont. ___, 674 P.2d at 487.
124. *Id.* at ___, 674 P.2d at 487-88.
125. *Id.* at ___, 674 P.2d at 490.
126. *Runge*, 180 Mont. at 91, 589 P.2d at 147.
127. H.B. 395, 49th Leg., (1985). On third reading the bill stated:
A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING THAT *CERTAIN* PURVEYORS OF ALCOHOLIC BEVERAGES ARE NOT LIABLE FOR INJURY OR DAMAGE CAUSED BY CONSUMERS AS A RESULT OF THE CONSUMPTION OF SUCH BEVERAGES."
BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:
Section 1. Selling or giving alcoholic beverages — ~~no~~ *LIMITATION OF* civil liability for consumer's acts. ~~No~~ *(1) EXCEPT AS PROVIDED IN SUBSECTION (2), NO* person or entity that sells, serves, gives, or delivers alcoholic beverages as defined in 16-1-106, whether or not for profit, in any place, including but not limited to a person's residence, a bar, restaurant, private or nonprivate club or institution, or private or nonprivate business, professional, social, or other party or event, is liable to any person for injury or damage of any kind wholly or partly

tives, however, amended the bill and in the process created a dramshop act. The house amendment said that the exemption would not apply to anyone who provided liquor to minors in violation of the liquor statutes or the statute prohibiting unlawful transactions with minors.[128] As amended, the bill could have had the effect of creating civil liability for violation of the statutes.

The amended bill passed in the House but received an unfavorable recommendation from the Senate Business and Industry Committee. Testimony before that committee indicated that the bill was drafted in response to concern by tavern owners that their liability insurance rates had risen considerably.[129] After hearing other testimony to the effect that the bill, even as amended, offered far too much protection to providers of alcohol and none to victims,[130] the committee issued a do not pass recommendation. The Senate followed the committee's recommendation and subsequent attempts to revive the bill failed.[131]

It can be inferred that there was sentiment, at least in the House of Representatives, which favored imposition of some liability on those who provide liquor in violation of statute. The amendment indicated a willingness on the part of the legislators to provide a remedy for minors and third parties injured as a result of minors' intoxication. The Senate vote, as well, may suggest that victims should have greater remedies than those provided in the amended bill.

C. *Policy Considerations Favor Some Liability*

Of 204 fatal auto accidents in Montana last year, ninety-nine involved alcohol.[132] Twenty-eight per cent of injury-producing accidents involved alcohol.[133] Montana, like a number of other states,

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caused by the consumer's being under the influence of alcoholic beverages.

(2) SUBSECTION (1) DOES NOT APPLY TO ANY PERSON OR ENTITY THAT SELLS, SERVES, GIVES, OR DELIVERS ALCOHOLIC BEVERAGES TO A PERSON UNDER THE LEGAL DRINKING AGE IN VIOLATION OF 16-3-301, 16-6-305, OR 45-5-623.

(italics denote material added by amendment).

128. *Id.*

129. D. Brown, Remarks at the hearing on H.B. 395 before the Senate Committee on Business and Industry (March 15, 1985).

130. K. Englund, Montana Trial Lawyers Association, Remarks at the hearing on H.B. 395 before the Senate Committee on Business and Industry (March 15, 1985).

131. MONTANA LEGISLATIVE COUNCIL, FINAL REPORT ON STATUS OF HOUSE BILLS, 49th Leg., at 42 (April 26, 1985).

132. *Accident Statistics for Montana 1984*, available from the Montana Highway Patrol. The statistics additionally show that, of 4799 total drivers involved in alcohol related accidents, 853 were teenagers.

133. *Id.*

is making strong efforts to remove drunken drivers from the highways. Criminal sanctions may be imposed on both the drunken driver and one who provides liquor in violation of statute.[134] Criminal sanctions give no relief, however, to one who is injured or killed by such drivers. The general policy of the law is to afford compensation to those injured by unlawful acts.[135] Yet, under the common law rule, providers of alcohol, even though they may be violating the law, are completely insulated from liability. The only justification that has been advanced for this protection is that the drinking, rather than the serving, is the proximate cause of the injury.

Proximate cause, however, is essentially a question of public policy.[136] "Proximate cause is a twofold legal concept which may limit liability depending upon the existence of (1) an intervening act and (2) the unforeseeability of that intervening act."[137] As Judge Jameson noted in *Deeds*, if the provider of liquor knows that the drinker will be driving, an accident is a reasonably foreseeable result of furnishing alcoholic beverages to an intoxicated person.[138] Other courts have followed this reasoning to conclude that providing alcohol is a proximate cause of injuries inflicted as a result of intoxication. Under this analysis "consumption and injury-producing conduct are foreseeable, intervening causes that should not relieve the supplier of alcohol from liability."[139]

If House Bill 395 had become law, Montana could have become one of a number of jurisdictions that define the provider's duty using liquor control statutes. The problem with this approach is that it applies the same standard of conduct to vendors and noncommercial providers. As the court noted in *Runge*, vendors are frequently in a better position to monitor their patrons than a social host would be.[140] A better approach is to use a common law negligence analysis.[141] In this way, the conduct of the provider can

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134. MONT. CODE ANN. §§ 16-6-314, 61-8-401 to -408 (1983).

135. MONT. CODE ANN. § 27-1-202 (1983).

136. Comment, *Employer Liability for a Drunken Employee's Actions Following an Office Party: A Cause of Action Under Respondeat Superior*, 19 CAL. W.L. REV. 107, 109 (1982). *See also* Palsgraf v. Long Island R.R., 248 N.Y. 339, 352, 162 N.E. 99, 103 (1923) (Andrews, J., dissenting).

137. Green v. Hagele, 182 Mont. 155, 160, 595 P.2d 1159, 1162 (1979).

138. *Deeds*, 306 F. Supp. at 358. *See also Johnson*, 496 F. Supp. at 604.

139. Note, *Expansion of the Duty Concept Via Foreseeability of Injury: Otis Engineering Corporation v. Clark*, 21 HOUSTON L. REV. 559, 572 n.100 (1984).

140. *Runge*, 180 Mont. at 94, 589 P.2d at 147. The Wyoming Supreme Court has noted that vendors are in a better financial position than a minor customer, and may also need the additional deterrent that civil liability would provide. McClellan v. Tottenhoff, 666 P.2d 408, 415 (Wyo. 1983).

141. Graham, *supra* note 31, at 587.

be compared to a reasonable person faced with the same set of circumstances. The traditional bar is too broad. Common sense tells one that there are bound to be situations in which serving alcohol to a minor or an intoxicated person is negligence. The position that such serving can *never* be the proximate cause of harm, however, will deny relief to an injured party. The Montana court has said that causation is a fact.[142] Under current Montana law, however, it is a fact that a plaintiff who has been injured by an intoxicated person never has a chance to establish.

IV. Conclusion

In view of the fact that drunken driving has become a national problem and injuries caused by drunken drivers are frequently serious, the common law rule that the drinker is solely responsible for her actions is no longer viable. The trend across the country is to recognize at least a limited cause of action for negligently serving alcohol. Most jurisdictions will hold vendors liable, and a few have extended liability to social hosts. Courts and legislatures have exhibited particular concern for minor drinkers and third parties injured by them. Montana is one of only ten jurisdictions refusing to impose *any* liability.[143]

The time has come for Montana to allow relief to parties injured as a result of negligent provision of alcohol. The people of Montana have made a commitment to the reduction of drunken driving. The House of Representatives has indicated that it does not support absolute protection for providers of alcohol. The court should look to the well-reasoned analysis of the federal court in *Deeds*, and abandon the overbroad common law position in favor of liability when any provider acts negligently and injury results.

142. *Green*, 182 Mont. at 161, 595 P.2d at 1162.
143. Note, *supra* note 20, at 290 n.49.